IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1949 OF 2006

M/s. SUDHIR TRANSPORT LTD. & ANR. .. PETITIONERS

Versus

NAND KISHORE MEHRA & ANR. .. RESPONDENTS

Mr. U.P. Warunjikar for petitioners

Ms. M.M. Deshmukh, APP

CORAM:-SMT. RANJANA DESAI, J.

DATED:-13/12/2006

P.C.

. The petitioners are accused in Case No. 1670/M/2001 (C.C. No. 893/SS of 2004) pending on the file of Additional Metropolitan Magistrate's 5th Court at Dadar, Mumbai. Process was issued against the petitioners for offence under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 ("the said Act" for short), on 28/8/01. Being aggrieved by the issuance of process, the petitioners filed Criminal Revision Application No. 163/05 in the Sessions Court,

Mumbai. The said application was dismissed on 11th August, 2006 and hence this writ petition.

2. I have heard Mr. Warunjikar, the learned counsel appearing for the petitioners.

3. The case of the petitioners is based on Section 87 of the said Act. Mr. Warunjikar drew my attention to a xerox copy of the cheque in the sum of Rs.14,50,000/-which according to the 1st respondent/complainant, has been issued by the petitioners. The cheque is dated 12//12/2000. Mr. Warunjikar pointed out that word "self" written on the cheque has been encircled and struck off and, thereafter, the name of the complainant is written as payee of the cheque. He submitted that there is no counter signature of the petitioners. He submitted that this is a material alteration within the meaning of Section 87 of the said Act and the said alteration renders the said cheque void as against the present petitioners He submitted that, therefore, on the basis of the said cheque no process could have been issued against the petitioners.

4. The learned counsel made a grievance that the

learned Magistrate has not applied his mind to this fact when he issued the process and the learned Sessions Judge, who dismissed the petitioners' revision application has also not considered the submissions advanced by the petitioners.

5. Mr. Warunjikar drew my attention to the contents of application for recalling of process filed by the petitioners before the learned Magistrate. He drew my attention particularly to paragraph 5 (a), (b) and paragraph 6 of the said application. He submitted that it is categorically mentioned in these paragraphs that there is material alteration in the said cheque and, therefore, the said cheque is void as against the petitioners. He submitted that it is specifically stated that consent contemplated under Section 87 of the said Act can only be evidenced by the signature of the drawer of the cheque and in the present case the same is missing and, therefore, the alteration cannot be the result of consent.

6. Mr. Warunjikar also drew my attention to the letter dated 7/6/01 which is referred to in paragraph 6 of the application filed by the

petitioners. He submitted that it is the complainant who had written this letter wherein it is mentioned by him that a self bearer cheque bearing No.375484 dated 12/12/2000 drawn on State Bank of Mysore, Industrial Finance Branch, Banglore for Rs.14,50,000/- was purportedly given to him by M/s. Shrusti Financiers, Mumbai against the complainant's dues of Rs.17 lakhs. Mr. Warunjikar contended that, therefore, this cheque was given to M/s. Shrushti Financiers and M/s. Shrusti Financiers passed it on to the petitioners. He submitted that all these points were not considered by the learned Sessions Judge.

7. It is true that the Sessions Judge has not made reference to the above points in his order. He has stated that the question whether there is a material alteration as regards the cheque in question cannot be examined as if it is a mere theoretical question without any factual shades or basis and the factual aspects naturally will have to be considered during the trial. Though the learned Judge has not referred to the contents of the application to which I have made reference, in my opinion, the ultimate conclusion drawn by him cannot be faulted. Undoubtedly as per Section 87

if there is any material alteration the negotiable instrument is rendered void as against any one who is party thereto at the time of making such alteration, if such person does not consent thereto unless it was made in order to carry out the common intention of the original parties. This section itself indicates that if alteration is made by consent and it is made to carry out the common intention of the parties it shall not render negotiable instrument void. As to whether there was consent or not and whether the alteration was made to carry out common intention can only be decided after the evidence is adduced. It is undoubtedly a question of fact. What is the effect of letter dated 7/6/01, whether in fact the cheque was given by M/s. Shrusti Financiers to the complainant can also be decided after the evidence is adduced. It is not possible to prejudge these issues at this stage and on that basis quash the process. In my opinion, therefore, no interference is warranted with the impugned order. The petition is dismissed.

8. At this stage, Mr. Warunjikar says that the petitioners want to challenge the present order in the Supreme Court. Respondent 1 has been served,

however, he is not present in the court nor is he represented by a lawyer. In the peculiar facts and circumstances of the case, therefore, to enable the petitioners to carry the matter further, the present order is stayed for a period of four weeks. Interim stay is continued for a period of four weeks.

JUDGE.